THE COURT: Why do you want Mr. Lee, Ms. Wipper?
MS. WIPPER: Because he is part of MSL Group. And he's -- we were never told by defendants that they were not a PR agency. We have asked --
THE COURT: Now you have been told they are different from the rest. Do you still want Mr. Lee?
MS. WIPPER: Yes. And I would propose that --
THE COURT: All right, you're not getting Lee.
MS. WIPPER: OK.
THE COURT: Let's narrow this list.
MS. WIPPER: Can we reconsider Winter & Associates because the organization --
THE COURT: No, no, not at this point without further evidence as to why your plaintiffs have standing to deal with this other than if Mr. Tsokanos and others in senior management of MSL were discriminating against women during this period, in which case it doesn't matter what Winter was doing.
MS. WIPPER: Well, I have an org chart right here that shows that Winter & Associates reports right into Jim Tsokanos.
THE COURT: OK. So what?
MS. WIPPER: So they're part of the leadership team that are making the decisions.
THE COURT: I don't know what a leadership team is in this capacity.
MS. WIPPER: It says leadership team at the top of the

organization chart.

THE COURT: Let me see the chart.

I'm missing this. Where is Winter on here?

MS. WIPPER: It's in the box at the bottom. I think it's sort of in the middle.

THE COURT: Well, it's various people who report to Masini, et cetera.

MS. WIPPER: No, it reports through that top layer to Jim, if you see --

THE COURT: Yes, it reports to Masini, and Masini reports to Tsokanos. So does Canada and various other things. So what?

OK, denied at this time without prejudice to renewal at some later point.

MR. ANDERS: Your Honor, I guess, going down the list, the first person that I guess I would take issue with, based on how we're doing this is, Scott Bedowin. He's an SVP of Global Consumer Marketing, not at that MD or HR type level that we were considering, so I think he should come out.

THE COURT: OK, what's his role?

MS. WIPPER: Your Honor, defendants have decided to put in the immediate supervisors of our plaintiffs. We didn't request that. What we have done is put in comparators to our plaintiffs, and we had a plaintiff who was --

THE COURT: If he is a comparator -- and this is email

searches that apparently are going to be run across everybody's email -- you're going to get a lot of stuff from so-called comparators that isn't relevant, it doesn't make sense to do it as a uniform group. If you want to say that you've got certain comparators who you want different searches run on, that's a different story. It doesn't make sense to pull all their material in because they're a comparator at the same level.

MS. WIPPER: We would agree to that.

THE COURT: All right, my 12:00 o'clock call has called in. I have lunch at 1:00. I'm hoping this won't take long. Do you all want to just sit here or do you want to go into the jury room and maybe work out some of these issues? Go, lawyers and consultants, as needed, into the jury room. Do not leave there. We will come get you after I deal with this call.

(Recess)

THE COURT: OK, it's somewhere between 12:40 and 12:45. We're back on the record after my other conference.

What progress have you made? Or perhaps the other way of looking at it is: What is it in the 15 minutes we have left before lunch that you want me to rule on or give you advice on with respect to the ESI protocol?

MR. ANDERS: Your Honor, we spent the bulk of the time talking about the custodian list. We have identified five custodians that are, I think, more on the either comparator

category or secondary category where I think your Honor suggested that maybe those email accounts get filtered prior to being put into the database -- that's what we were trying to understand -- but we have identified five where at least plaintiffs would be willing to apply some type of keyword search in the filtering to them first.

THE COURT: All right.

Ms. Wipper?

MS. WIPPER: With respect to the custodians, I believe that the parties would be able to work it out. What we would like to hear from the Court is your view on the differences between the two protocols. Our protocol is --

THE COURT: I have no idea.

MS. WIPPER: OK.

THE COURT: When you send me 50 pages each, late at night and/or the morning of, when you knew this conference was scheduled for quite some time, there's a limit, and it was not done as a redline or anything else as to where your differences are. So you tell me what it would be most helpful for you, for the ten minutes or so we have left, to rule on or advise on, and I'll deal with it.

MR. ANDERS: Your Honor, I think that the key issue is how we use predictive coding, and that's where there's probably -- that's why we have our experts here, our vendors.

The way defendant MSL proposes using the predictive

coding process would be as follows: We start with an initial random sample, with a confidence level of 95 percent, with an interval of plus or minus 2 percent. With the 3.2 million document database, that random sample is 2,399 documents. We have gone through those preliminarily. I had associates go through those; I just finished going through it last night.

Of that 2,399 --

THE COURT: Just to stop you right there, my understanding of predictive coding is that the coding, as painful as it is, should be done by a very senior attorney, meaning partner level or very senior associate, not the usual team of umpteen lower associates with a lower billing rates.

MR. ANDERS: That's why I reviewed it, your Honor.

THE COURT: Well, as "reviewed it" as every one of the coding decisions or spot-checked it?

MR. ANDERS: No, where I am right now is I have gone through every one that was marked as relevant, I went through 400 so far that have been coded as not relevant, and I intend to go through all of those but I first looked at the ones that were relevant.

THE COURT: At the end of the process, you're going to have done every single one of the --

MR. ANDERS: Yes.

THE COURT: Then I'm not sure why your client paid for someone else to do it first, but that's not my problem, that's

their problem.

OK, continue.

MR. ANDERS: So far 36 were deemed relevant. Of the 400 not relevant I have reviewed, they were clearly not relevant. So right now the baseline is .015 percent of that random sample was relevant. If you translate that to the entire database, that's 48,000 documents.

After we did a random sample, then what we have done at the same time is we have applied keywords and we have taken the results of those keywords and sample-coded. So, for example, if there's a keyword "reorganization," we may have reviewed the top 200 random hits. We did that across the board.

Also, to respond to several of plaintiffs' targeted document requests, we ran targeted searches across the database. That's what we have already produced, about a thousand pages of documents. So we have that coding that's in there.

Plaintiffs' counsel, they have sent us now three different revisions of keywords. What I have proposed to plaintiffs' counsel is, I'll give you the hit lists. I've already given them two sets of hit lists; we have another set to give them, I'll review -- or we'll review 3,000 of those hits, you tell us how you want us to review it but pick the hits, we'll review any of the top 200 in these ten categories,

you tell us how to review it. We'll give them those results as well.

Once that initial coding part is done, we'll let the system go out, it will do a sample of, you know, train itself, we'll get the results. Our proposal was to review, one, a random sample of the results that come back as well as certain judgmental sampling, share those results with plaintiff, they can make their suggestions on how certain things should be coded.

We have also identified six different categories that documents can be coded towards. I think plaintiffs have asked for us to do eight or nine. We can figure that out. Go through that iterative process twice. At that point -- and this is where sort of the proportionality and cost-limiting comes in -- after we've gone through the iterative process twice or if we have to go through another time, have the computer give us the documents in rank order. And we have agreed or proposed reviewing the top 40,000 rank documents. And we arrived at that 40,000 document number -- we estimate it will cost approximately $200,000 using a five-dollar a document cost estimate, it will cost 200,000 to review the 40,000.

When you take that 200,000 in review costs and you couple it with our vendor costs, we're looking at a total spend of approximately 550,000. We understand that plaintiffs take issue with some of our vendor costs -- we can dispute that --

but even just looking at the $200,000 attorney fee review cost, we think that that is a more than appropriate amount to spend to see what we get. We have never told plaintiffs that we're going to do this and this is all that you get. Our view is, let's see what this yields us first, we think these are the most relevant people, this is a sophisticated and excellent way to find the cream of the crop, if you will. And after that process is done, we'll be in a much better position to argue and debate whether or not the incremental value of searching another custodian is going to be worth the cost. And that's essentially our view.

THE COURT: Let me hear from Ms. Wipper.

MS. WIPPER: Your Honor, we disagree with defense counsel's position that the only issue is predictive coding, because that kind of skips over a lot of other issues that --

THE COURT: Well, let's deal with the predictive coding piece. I understand, from what little I have skimmed of your proposal and theirs, that they're sort of only looking at an email archive and you want lots of other steps looked at.

But assume that that other piece gets resolved, meaning where they have to look, and maybe their 3.2 million database will double or go up to whatever, but what's wrong with the predictive coding methodology they have proposed, which also sounds like it's being run on a fairly transparent and cooperative basis?

MS. WIPPER: Well, the main issue is cost because --
THE COURT: No, but where? In other words --
MS. WIPPER: It's impacting the methodology.
THE COURT: Well, the question becomes the review. And my understanding of the way this works is by the time that the system spits this out, and whether it's the top 40,000 or whether the break point is 50,000 documents or 30,000, that 90-something percent of the relevant documents are going to be found in the top hits, and that the costs of reviewing the rest is not worth the candle in most cases.

Now, where that line gets drawn is something that I can't decide until I've seen the results. In other words, when one sees the results, as I understand it from this method, one can see a sharp drop-off at a certain point, at which you then still sample the documents that are not going to be reviewed, and that's part of this whole iterative process.

If you are seeing that the top 40,000 documents give you 90 percent of the responsive documents, and it's going to cost a million dollars to go to the next hundred thousand documents for eyes-on review, to get another 5 percent, it's probably not worth it. If it's worth it to go to the top 50,000 because that's where the cliff line seems to be, that's what people are going to have to do.

It also may be that once privilege is determined, that they will let you -- the rest of this is so likely to be junk,

that you want, under an attorneys'-eyes-only or some process, an informal basis, you want to look at the documents that go from 40,000 to 80,000, you can look at them and if you tell them, you know, gee, having looked at it, there's a lot of good stuff here, then there's some problem with the process.

I'm not saying 40,000 is the cutoff -- I can't really determine that -- and I invite both sides' experts to tell me if I've gotten this wrong but I've sat through a lot of training sessions on this, wherever that cliff is, that where is where the break should be. So if that was the only problem you had with that part of the predictive coding process, then it sounds like you all can go down this road, all of this, without prejudice to additional search as may be necessary and additional processes as may be necessary.

So is that the only problem, Ms. Wipper, or is there anything more?

MS. WIPPER: No, there's a dispute about the scope of relevancy. What happened --

THE COURT: I've ruled on that. That's what we spent the morning doing.

MS. WIPPER: OK.

THE COURT: So whatever rulings I gave on that are going to apply to the emails as well. So any positions they were taking in the ESI protocol are now going to have to be revised, based on what I have done this morning, and similarly

on your side.

MS. WIPPER: OK, and also I'd like to respond to defense counsel's description of their proposal. I'd like DOAR to respond and give you an overview, if we may, on our proposal on predictive coding.

THE COURT: All right, though I guess I'd like to know where it differs.

MS. WIPPER: Well, it's actually a direct response to their proposal.

THE COURT: OK.

MS. WIPPER: So who am I going to hear from?

MR. NEALE: Paul Neale, your Honor.

THE COURT: Mr. Neale?

MR. NEALE: I actually think you pointed to exactly the issue. We have not taken issue with the use of predictive coding or, frankly, with the confidence levels that they have proposed except for the fact that it proposes a limit -- the ultimate result of 40,000 documents before we have seen any of the results coming out of the system.

THE COURT: I've already said -- and I want to make sure that defense counsel realizes it -- I'm not buying your 40,000 as a pig in a poke. I understand the concept, but where that line will be drawn -- whether it's 40,000, 50,000, 60,000, 20,000 -- is going to depend on what the statistics show for the results.

MR. ANDERS: I guess, your Honor, that's why I stood up before, because I wanted to ask you something. I understand that that cliff line may be at 80,000 documents. The reason why we picked the 40,000 is what we're trying to do is also incorporate the cost element. We picked 200,000 as what we think --

THE COURT: Proportionality requires consideration of results as well as costs. And if stopping at 40,000 is going to leave a tremendous number of likely highly responsive documents unproduced, it doesn't work. Plus, of course once you have the predictive coding run, the cost after that is how much you're doing an eyes-on review of. And once you've weeded out the privilege documents -- and I assume you either have the 502(d) order or you will be providing one for me to sign off on, because I think in a case of this size, if you're not agreeing to one, you're committing malpractice -- how much money you spend thereafter is a result of how much you want to know what's in the documents or, putting it perhaps a different way, CYA. If the first 60,000 are clearly showing that they're highly relevant but you're running out of money after 40,000, don't review the other 20,000. That's up to you.

MR. ANDERS: We've considered that, your Honor, and I think the attorney-eyes-only type of agreement or designation may be appropriate here, because one of the concerns we have is, some of the plaintiffs are now working for competitors. To

the extent that they're seeing --

THE COURT: This is not a case where I assume, other than on anecdotal, that there is going to be much need for the individual plaintiffs to look at the documents. I'm sure you can all work that out.

Now, unfortunately it's 1:00 o'clock. I'm happy to have you come back. I've got a 2:00 o'clock, and there may be a 3:30 from people who forgot to show up this morning and were told to try to get their act together and get here this afternoon. You can come back this afternoon, you can come back in a day or two. I think we have made some good progress, and I know that you're coming from further away than usual, so I'd like to make the most use of your time.

What's your pleasure? You want to come back at 3:30 in the afternoon and use the time from now to then? You can use the jury room.

MR. ANDERS: Maybe, your Honor. The only reason why I say that is, tomorrow I am leaving the country for a week for a family vacation, so I'm out of pocket for a week; I'll have some email but not a lot. So, again, I don't want to impose on everybody else, but that's my scheduling issue, so I'm not sure how much we'll get done within the next week.

THE COURT: That's why I'm suggesting you maximize -- I don't know what time your flight home is -- well, you're in Morristown.

MR. ANDERS: Today's fine for me, your Honor.

THE COURT: You're fine for today. If everybody wants to stay -- you just spent an hour talking about custodians and made some progress -- there's a certain benefit, I think, in keeping you hostage because it avoids the delay between phone calls, et cetera, et cetera. So if you want to take an hour for lunch, be all back at 2:00 o'clock, you can use the jury room.

MR. ANDERS: That's perfect.

THE COURT: And as soon as whatever is going on with my afternoon conferences gives me time to see you, we'll deal with you, but you're not leaving until you've checked out with me.

MR. ANDERS: Thank you, your Honor.

THE COURT: OK. Enjoy lunch, but get back, use the cafeteria on the eighth floor or whatever else, but don't waste half the afternoon by having a nice lunch.

MR. ANDERS: Understood.

(Recess)

THE COURT: We are back on the record for part two of Da Silva Moore et al. against Publicis.

What progress have you been able to make on the ESI protocols or, more importantly, which of the issues you've talked about would you like a court ruling or guidance on? Whatever you have agreed upon we will memorialize in some other

way.

MR. ANDERS: I think we made a lot of progress, your Honor. It may be easier just to say where we are.

On the list of custodians, we have identified eight custodians that the plaintiff would like us to add, five where they would be willing to first apply some level of filtering to their results, and then we would either manually review or possibly add those results into the database. We're going to go back and just confer with our clients and those individuals; there may be certain sensitivities about the particular people but we at least have been able to further narrow the custodians on the overall concept of predictive coding. We had a lot of conversation and discussion about that; I think we're in agreement on the process.

The process is going to be generally as we discussed it before, but what we're going to do is, I think, have more of the iterative reviews, and what we're going to try to do is hopefully be able to do those iterative reviews until we find the cliff that your Honor was referring to.

My only concern, and what I want to work into the agreement, is if these iterative reviews are taking longer than anticipated and the costs are mounting, having some mechanism in the agreement where there can be a point where we either discuss it or raise it with your Honor, that, look, we have reviewed 60,000 so far, this is what's coming back, the end

doesn't seem to be in sight and we've spent X amount, just having something in the agreement to address that possibility.

THE COURT: I have no problem with you all putting in the agreement that you're going to cooperate and work in good faith. But if things aren't working out because of expense or results not being what either of you hoped for or whatever, that it can be revisited with the Court, the caveat to that is obviously once you go down a certain route, it's going to be very expensive to completely abandon that and say we're now going to do something completely different, so that's probably not something you'll be able to do.

Tweaking it, in terms of adding another custodian late or doing a further iteration where you change a search term or better train the computer with some more documents, I don't have a problem with that occurring or the converse of that, with the defendant coming in and saying, you know, we've already spent twice what we thought we were going to spend, we've made enough progress that the next X percent search that that the plaintiff wants us to do is not worth the candle. That's what I said this morning as well.

All right, what else?

MS. WIPPER: We would add to that, plaintiffs would propose if we get to that point, that defendants don't do a manual review and just turn over the documents.

THE COURT: All right, that's an argument you can make

later on, that, OK, this system kicked out all of this. But usually the sampling is in lieu of that, which is to say that if you get to a certain cliff and you have reviewed -- I'll use defendants' number from before -- 40,000 and the next 50,000 are considered not likely to be relevant and you run a sample, statistical or random or whatever, of that balance, you say, OK, we looked at another thousand documents and found one that really was relevant, that's probably the end of the ballgame.

On the other hand, if you run a thousand and you find a hundred that are relevant, that may mean that more work has to be done in one way or another. And I'm not meaning to fully prescribe any, which your experts sitting behind you can probably do better, on what is your 95 percent confidence level or any of that stuff, but at some point it doesn't mean that because predictive coding spits it out as having a 1 percent chance of relevance, that I'm going to say, OK, the defendant has to forego manual review but produce all of it, as opposed to, you'll do a sampling and see if it really is mostly junk.

Understood?

MR. ANDERS: Understood.

THE COURT: On both sides?

MR. ANDERS: It makes sense, your Honor. I guess the way we had initially tried to craft the proposal was by putting up front the dollar figure that we thought was appropriate.

THE COURT: That's somewhat meaningless. And,

frankly, it then gets into fights about "if you didn't get to Recommind and you went to XYZ company, that piece of it would be 25 percent cheaper and that shouldn't be attributable to us and your associates at Jackson Lewis are paid too much per hour, that shouldn't be attributable to us." I will look at proportionality, but I'm not telling you that there is a particular number that's better than another on how much work you've got to do.

MR. ANDERS: I understand. That came across clear.

I just want to make sure that I understand what you're saying, is if, as we're going through this iterative review, we reach a point -- and I don't know what point is -- in terms of cost, where even if the computer is saying there is X percent relevance still out there, that we're not foreclosed from making the proportionality argument at that point.

THE COURT: That is correct.

MR. ANDERS: OK.

The other thing we had discussed, your Honor, were those sources that would not be reviewed through predictive coding. For those sources, we have agreed to do targeted searches of some of them; for others, we need to find more information about what information is actually housed there, but I think we were able to work through some of these other sources, shared drives --

THE COURT: This is the material that's on page 2 and

3 of plaintiffs' proposal, I assume?

MR. ANDERS: Yes, your Honor.

THE COURT: I'm not asking you to give me much more detail on that as long as there is agreement so that you're moving forward without the need of further court help on it.

MR. ANDERS: There is, your Honor. We're moving forward on that.

MS. WIPPER: There are two points that we wanted to raise. The first one was concerning the time period for the emails.

Earlier today defense counsel said that their email archive went back to 2008. There is also a separate email that's available from a legacy system that's stored in home directories or shared folders. So we would propose that for pay discrimination issues, that we would apply the longer period to 2 --

THE COURT: For pay discrimination, we're not doing an electronic search. You're getting that from the personnel material and the material you got on payroll. It's unlikely that email is going to find anything, and if it is, frankly, it's going to find it in the post-2008 period that's in the -- I'll call it the master database, the archive system, that they have established. So I don't see that as being necessary, certainly not in any immediate wave.

On all of this, I'm not foreclosing you, as you

develop information from the documents produced or from depositions, from saying that you have learned something new, but if there is a smoking gun email that says, you know, I'm the president of the company and it is our policy to pay women less than men, I guarantee you that will get repeated in the newer system. And for that needle in a haystack, I'm not going to have them bring up an additional search.

What else?

MS. WIPPER: I would just add to that much. They haven't produced the payroll data yet.

THE COURT: We talked about all of that this morning. I'm not revisiting things. It's been a long enough day.

MS. WIPPER: I just wanted, before we move from predictive coding, I also want to address the issue codes, what we agreed to do, because there's a dispute about the definitions that plaintiffs proposed. We're going to try to deal with that in the coding process; and it's possible, if we can't agree, that we would need the Court's assistance.

THE COURT: I'm sure I'll be seeing you again soon.

MS. WIPPER: OK.

MR. ANDERS: I believe that was it, your Honor. I think we were going to talk about some time frames. I think at least with the ESI protocol, my plan is probably the night before I leave to at least get emails out on questions about parts of the systems and then as soon as I return, if not while

I'm away a little bit, try to redraft the protocol to address what we discussed today.

THE COURT: I know every lawyer thinks they're indispensable and I'm not pulling the "Jackson Lewis is a big firm and you're all fungible," but is there not another person who may be less email savvy or computer savvy than you, such as Ms. Chavey, for example, who can follow up, along with the folks from Recommind and plaintiffs' counsel, and not lose an entire week because you're on vacation?

MS. CHAVEY: Of course, your Honor.

THE COURT: And I happen to know, it may not be on this case, if it's a true e-discovery dispute, I happen to know your Florida e-discovery counsel very well --

MR. ANDERS: He knows a little bit.

THE COURT: You can bring Mr. Losey into the mix if need be.

MR. ANDERS: OK, understood.

THE COURT: What else?

MS. CHAVEY: Your Honor, I know your Honor said you weren't going to reconsider what was addressed this morning, but I did look, during the break, about the issue about Mr. Tsokanos in complaints that had been made against him. I think on plaintiffs' counsel's representation that their understanding was there had been a complaint in 2005, you ordered us to provide that. There was not a complaint in 2005.

There was something earlier than that. And I just wanted to --

THE COURT: How early?

MS. CHAVEY: 2003.

THE COURT: But that was the Atlanta --

MS. CHAVEY: It was in Atlanta.

THE COURT: Produce it. Obviously it's discrete and can be found.

Before I lose track, for the paper discovery we talked about this morning, how soon can you complete that? One week, two weeks, six years? Come on.

MS. CHAVEY: Your Honor, we would need at least 30 days.

THE COURT: I don't know how you're going to do that in 30 days, finishing e-discovery protocol that's not going to be finalized for more than a week despite me getting other people involved while Mr. Anders is away, run the ESI, go through iterations and meet a June 30 discovery deadline with depositions and everything else. I think you're being a little generous there. So one more chance. Working harder, faster, et cetera, how soon can you do it?

MS. CHAVEY: Well, one issue, your Honor, for example, is with the personnel action notices. We understand the order to require us to work with the plaintiffs to come up with a statistically significant sample. That in and of itself is going to take a while and then there's going to be the

searching for the notices, so there is time that needs to be built in in order for that to occur.

THE COURT: Can you live with 30 days, Ms. Wipper? If not, tell me what you can live with.

MS. WIPPER: We have a deposition scheduled with defense witnesses starting the end of this month.

THE COURT: With all due respect, if you want to keep to that schedule, you're going to be deposing them without documents.

MS. WIPPER: Correct.

THE COURT: And let's all be clear on the way I run this, which is, if you want to take early depositions to learn things, that's fine; you don't get to redepose somebody whose deposition was finished because you get documents later that you knew you didn't have, as opposed to when they say, OK, we've completed our document ESI production and you take a deposition and then a week after the deposition they say look what we found in the warehouse somewhere; then you may get another deposition. So if you want to take a deposition at the end of the month, that's fine, but let's say I push them to get you something in two weeks, which means you both have to be very fast on how you're running the statistical significant determination, you're going to have to review it before the deposition, it's not likely to happen.

MS. WIPPER: I would propose three weeks. We work

with statisticians regularly so we can have the sample done or our proposed --

THE COURT: That sounds like a viable compromise.

So that is three weeks from today, which is January 25th, subject to somebody, by written agreement or by applying to the Court for more time, we'll go from there.

OK, other than a date for you all to come back and probably a date for you to complete the ESI protocol to ensure that your feet are held to the fire, is there anything else we need to do on discovery today?

MS. WIPPER: I just wanted to address one point from earlier today and just get clarification from the Court. On the cutoff date for the production, you said February 2011 for the HR complaints. I'm wondering if that's a global cutoff date. We have a plaintiff that left the company after that date, Carol Pearlman --

THE COURT: Is she in the original complaint or the amended complaint?

MS. WIPPER: She's an opt-in plaintiff.

THE COURT: When did she opt in?

MS. WIPPER: I don't know off the top of my head. Probably months ago.

THE COURT: The amended complaint is dated April 14th. Was it before or after?

MS. WIPPER: No, it was after that.

THE COURT: You've got to have some way of dealing with this. So I'm inclined to either leave it at the February date or maybe to push it to April 14th of 2011, other than when we get to privilege issues, I'm not going to require them to log almost anything post initial complaint.

MS. WIPPER: We would propose the amended complaint date as the cutoff.

THE COURT: So we're adding a month and a half or something. Problem, agreement?

MS. CHAVEY: Well, it seems appropriate to limit it to and cut it off at the date of the initial complaint. The fact that Carol Pearlman opted into the April Pay Act claim later doesn't seem to affect the Court's ruling that the date would be February.

THE COURT: All right, let's leave it where it was originally.

What else?

MR. ANDERS: Your Honor, I just want to make sure I heard correctly: Did you give a definite date for when the ESI protocol must be completed?

THE COURT: No. Give me a proposal. A week after you come back or a/k/a two weeks from today?

MR. ANDERS: That would be perfect.

THE COURT: Agreeable?

MS. WIPPER: Sure. And you want a joint proposal,

your Honor?

THE COURT: Yes. And if you can't agree, I want it as a single document with paragraph 3, whatever paragraph 3 is about, 3(a) plaintiffs' proposal, 3(b) defendants' proposal, and then a cover letter from each of you explaining, to the extent it's not immediately obvious, what it is you're disagreeing on. So that's January 18th.

OK, next, date for our next court conference, what's your pleasure?

MS. WIPPER: How about a week after the ESI protocol?

THE COURT: Well, I think that's probably going to be early unless you think there are ESI protocol problems, only in the sense that the document production out of what I'll call this morning's production is due the 25th. On the other hand --

MS. CHAVEY: Your Honor, what about February 2nd?

THE COURT: That's LegalTech week. Yes, by Thursday that's OK. February 2nd at 9:30.

Now, the other thing: When is it you plan to move for class certification?

MS. WIPPER: I believe it's in the schedule, your Honor.

THE COURT: I don't think it is but I'm willing to be educated.

MS. CHAVEY: Your Honor, it is in the scheduling order

but it is due on or before April 1st of 2013.

THE COURT: Frankly, that makes no sense to me. I know you convinced Judge Sullivan to do that. It won't be the first time I've overruled the district judge; it's a strange world that we live in.

Yeah, I understand the purpose of getting past the expert period, but if you make the motion on April 1, it won't be fully briefed until the summer of 2013, it won't be decided until the fall of 2013 or January 2014. You can't really do summary judgment or anything substantive until the class either has or hasn't been certified. And then if either a class or an FLSA collective action is certified or the appropriate other term for a collective action is approved, you've got to go through 30 days to draft the notice, 60 days or 90 days for people to opt in, you are assuring -- and this is something plaintiffs should be thinking about even more than the defendants -- you're assuring no merits resolution of this, assuming a class of any sort, class or collective is approved, until 2014 or '15. That hardly seems to be in plaintiffs' interests. And I'm not sure that on the FLSA collective action -- you've got discrimination claims -- that's one type of motion -- and to the extent you've got FLSA and New York Labor Law claims, that's a much more discrete area, it seems to me. And leaving all of that until the very end, particularly since FLSA requires opt-in plaintiffs, and my recollection but

you all tell me if I'm wrong, is that there is no stopping of the statute of limitations until they opt in?

MS. WIPPER: Correct.

THE COURT: So if this case, which began in early 2011, if it's not certified until 2014 or '15 for collective action issues, the whole period between now and then, when you will assume that if there was anything bad going on at the defendants, they will have cleaned up their act during the course of this lawsuit -- and I'm not saying I know there was anything bad or good going on -- you're assuring that the FLSA in particular, even with a six-year statute of limitations on the state claims, is going to be almost a nullity or it's going to be a totally different lawsuit, that most of the period within the statute of limitations is going to be a period on which there has been no discovery.

Does it make sense -- not that I want more work for Judge Sullivan or myself -- to do something differently for the FLSA New York Labor Law than the Title 7 and related discrimination claims?

MS. WIPPER: Well, your Honor, I think it depends on the discovery because we have the burden and we have been spending an enormous amount of time trying to get discovery in this case for many, many months. So, today, as I stand here today, I can't say for sure we will be prepared to file something until we have the discovery.

THE COURT: On the FLSA and New York Labor Law?

MS. WIPPER: We need the payroll data.

THE COURT: Well, you basically have that, I thought, subject to the cleanup -- and I'm not revisiting what I ordered this morning. So that you're going to have by the end of this month. Whatever work your experts need to do, I don't see waiting until April 1st of 2013, and, frankly -- and I'm not trying to help the defendants -- if I were them, I'd oppose certification at that point if for no other reason than that most of the period within the statute of limitations will be a period where there hasn't been discovery. And if we stick to the schedule, because you got Judge Sullivan to approve it and I decide not to stick my neck out and overrule him, so to speak, I'm not reopening discovery. You can bet on that. Once discovery closes, it is done, because nobody wanted bifurcation the second time today because 99 percent of it was held to be relevant either way. Think about it and maybe in February, too, we can revisit that issue.

MS. WIPPER: OK.

THE COURT: I guess the last issue, although I suspect -- I don't know what I suspect. I generally at first or early conferences raise the 636(c) issue. I don't remember raising it at our prior conference because they were on a sort of emergency basis, et cetera. But I remind both sides that pursuant to 28, U.S. Code, Section 636(c), if all parties

consent, then the case can be in front of me for all purposes, including the jury trial you've asked for here and any appeals to the Second Circuit, they're the same from a magistrate judge, consented trial or motion decision, as it would be in front of a district judge, and it's up to all of you and our missing friends from Publicis.

So by the February 2 conference, obviously a decision to keep thinking about it keeps your options open, but it also keeps one side or the other -- whoever is in favor of it now and the other one is not so sure, by two months later, that position may reverse. So the sooner you all decide, you decide, I'll ask you to tell me where you are at the February 2 conference and we'll go from there.

And finally -- perhaps my second "finally" but finally, the jurisdictional discovery and all that against Publicis, is anything happening in that area? I don't want them to prejudice them from not being here but I don't know that the quietness with respect to that, as opposed to everything going on here, is the result of nothing going on or is the result of there not being the same problems.

MS. WIPPER: Well, we served discovery on October 19th on Publicis Groupe according to the schedule, and on MSL. They asked for a month extension to respond. We gave that to them and they produced documents, some documents, Publicis Groupe, and responded with objections on the 21st. We're probably

going to have to have a meet-and-confer with them concerning some of their objections and their responses, but right now we don't foresee any disputes at this time.

THE COURT: Well, you've got a March 12th cutoff. The earliest I'm likely to want to deal with that, since it seems like you all are going slowly, is at the February 2 conference. That's going to leave you very little time if there are problems, to get them resolved and get whatever depositions or whatever are going to occur post the paper/ESI side of discovery. So don't lose sight of it. Let's have Publicis here at the next conference, even if there is complete agreement that everything they have been doing is fine.

The other thing is, you all can figure out how to do this when we're going to have megaconferences like this. I certainly prefer everyone to be present in person. If it gets to the point where you know in advance there's one minor issue and one of the local counsel, more local, will be here and the other is from San Francisco, for example, while the airlines need all the help they can get, it's not my job to feather their covers, so if you want to show up telephonically, ask for permission to do that, which, as I say, will be granted if you really think the conference is going to be the typical half hour discovery conference and not the 500 pages of letters, et cetera, et cetera, like we had today. You do not need to ask permission for your e-discovery consultants to attend. If

there are any ESI issues, and assuming you're willing to pay the freight for them, I am not only delighted to see them but they're usually a valuable addition.

I think that covers everything. I guess I'll just say, my rules provide that if things start going much more smoothly and two business days before the next conference we decide you really are getting along swimmingly and you worked things out and things should just be put off a few weeks, you can make that application, either by a joint phone call to my secretary or by a fax, requesting that, and nine times out of ten those requests are granted. They're not granted when they come in at 5:00 o'clock the night before and the Court suspects that somebody's already on an airplane. And they're not granted unless they're on consent, meaning if one side says I don't need the conference but the other side is frothing at the mouth because they're being frustrated, we're obviously going to have a conference.

Any questions?

MS. CHAVEY: No, your Honor.

THE COURT: All right, the transcript, as usual, constitutes the Court's order. And I think I may have said this once before -- and somebody certainly took up the process and therefore knows the process -- but I'll say it this last time, I may not say it again in the future: Pursuant to 28, U.S. Code, Section 636 and Federal Rules of Civil Procedure 6

and 72, any party aggrieved by a ruling at one of these discovery conferences has 14 calendar days to bring their objections to Judge Sullivan. The 14 days starts running immediately when you attend any in-person or telephonic conference and hear my ruling accordingly, regardless of how long it takes me to obtain the transcript from the reporter. And failure to file objections within that 14-day period constitutes a waiver for all further purposes in the case, including any appellate purposes.

With that, I'll require both sides to purchase the transcript from the reporter and with that, we are adjourned. Have a good flight back, or drive back, to everyone going in different places. Have a good vacation --

MR. ANDERS: Thank you, your Honor.

THE COURT: -- and happy new year. See you all in a month.

MS. CHAVEY: Thank you, your Honor.

MS. WIPPER: Thank you, your Honor.

MR. ANDERS: Thank you.

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